98

(2)

FILED

JUL 07 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1391

In the Supreme Court of the United States

ALVIN GEORGE VONNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record
MATTHEW W. FRIEDRICH
Acting Assistant Attorney General
VIJAY SHANKER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a court of appeals must review for plain error a claim that the district court inadequately explained the basis for a criminal sentence, when the defendant never informed the district court of his objection.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 7
Conclusion 13

TABLE OF AUTHORITIES

Cases:

Gall v. *United States*, 128 S. Ct. 586 (2007) 7, 8, 11, 12
Johnson v. *United States*, 520 U.S. 461 (1997) 13
Kimbrough v. *United States*, 128 S. Ct. 558 (2007) 8, 12
Rita v. *United States*, 127 S. Ct. 2456 (2007) 6, 8, 12
Sealed Case, In re, 527 F.3d 188 (D.C. Cir. 2008) 9
United States v. *Booker*, 543 U.S. 220 (2005) 2, 12
United States v. *Bostic*, 371 F.3d 865 (6th Cir. 2004) 5
United States v. *Bras*, 483 F.3d 103 (D.C. Cir. 2007) .. 7, 10
United States v. *Cunningham*, 429 F.3d 673 (7th Cir. 2005) 10, 11
United States v. *Dragon*, 471 F.3d 501 (3d Cir. 2006) 10
United States v. *Knows His Gun*, 438 F.3d 913 (9th Cir.), cert. denied, 547 U.S. 1214 (2006) 9
United States v. *Lopez-Flores*, 444 F.3d 1218 (10th Cir. 2006), cert. denied, 127 S. Ct. 3043 (2007) 9
United States v. *Lopez-Velasquez*, 526 F.3d 804 (5th Cir. 2008) 9

Cases—Continued: Page

United States v. *Mangual-Garcia*, 505 F.3d 1 (1st Cir. 2007), cert. denied, 128 S. Ct. 2081 (2008) 9
United States v. *Olano*, 507 U.S. 725 (1993) 12
United States v. *Peltier*, 505 F.3d 389 (5th Cir. 2007), cert. denied, No. 07-8978 (June 23, 2008) 10
United States v. *Perkins*, 526 F.3d 1107 (8th Cir. 2008) 9
United States v. *Rashad*, 396 F.3d 398 (D.C. Cir. 2005) 11
United States v. *Verkhoglyad*, 516 F.3d 122 (2d Cir. 2008) 9
United States v. *Vonn*, 535 U.S. 55 (2002) 13

Constitution, statutes and rules:

U.S. Const. Amend. VI 4
18 U.S.C. 3553(a) (2000 & Supp. V 2005) 3, 6
21 U.S.C. 841(a)(1) 1, 2
21 U.S.C. 841(b)(1)(B) (2000 & Supp. V 2005) 2
Fed. R. Crim. P:
Rule 51(a) 11
Rule 51(b) 12
Rule 52(b) 5, 12, 13

In the Supreme Court of the United States

No. 07-1391

ALVIN GEORGE VONNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 33-109) is reported at 516 F.3d 382. The vacated panel opinion of the court of appeals (Pet. App. 4-32) is reported at 452 F.3d 560.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 2008. The petition for a writ of certiorari was filed on May 7, 2008. This jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Tennessee, petitioner was convicted of distributing at least five grams of cocaine base, in violation of 21 U.S.C. 841(a)(1) and

(b)(1)(B) (2000 & Supp. V 2005). He was sentenced to 117 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. 33-56.

1. In August 2002, less than three months after completing a prison sentence for second-degree murder, petitioner engaged in two drug deals in which he sold approximately 53 grams of crack cocaine to a government informant. A grand jury in the Eastern District of Tennessee charged petitioner with distributing at least five grams of cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B) (2000 & Supp. V 2005). Petitioner pleaded guilty as charged pursuant to a plea agreement with the government. Pet. App. 35.

2. The Probation Office prepared a presentence investigation report (PSR). Based on the quantity of crack cocaine involved in the offense, petitioner's previous offenses, and his acceptance of responsibility (which yielded a total offense level of 29 and a criminal history category of III), the PSR recommended an advisory Sentencing Guidelines range of 108 to 135 months of imprisonment. PSR ¶¶ 14, 19, 22, 34, 55. Petitioner confirmed both orally and in writing that he had no objections to the PSR. Pet. App. 35; 2/7/2005 Tr. 4.

At the sentencing hearing, which took place three weeks after this Court decided *United States* v. *Booker*, 543 U.S. 220 (2005), petitioner requested a downward variance from the advisory Guidelines range. Petitioner contended that four considerations justified a sentence below the Guidelines range: (1) childhood abuse, neglect, and emotional trauma; (2) petitioner's 14-month presentence confinement; (3) petitioner's cooperation with the government; and (4) the calculation of the offense level based on relevant conduct, including drug quantity

not charged in the indictment. Petitioner also apologized for his conduct and asked for leniency. Pet. App. 35-36; 2/7/2005 Tr. 8-16, 24-27.

After listening to petitioner's arguments and apology and the government's response, the district court told petitioner that it "appreciate[d]" his apology, and it "encourage[d]" him to dedicate his time in prison to education and to learning the "life skills" that would benefit him upon his release. Pet. App. 36 (citation omitted). The court confirmed that it had "considered the nature and circumstances of the offense, the history and characteristics of the defendant, and the advisory Guideline range, as well as the other factors listed in [18 U.S.C. 3553(a) (2000 & Supp. V 2005)]." *Id.* at 28; 2/7/2005 Tr. 27-28. The court then sentenced petitioner to 117 months of imprisonment. That term, the court added, "is reasonable * * * in light of the aforementioned factors and is a sentence, furthermore, that will afford adequate deterren[ce] and provide just punishment." *Ibid.*

After announcing the sentence, the district court asked both parties whether they had "any objection to the sentence just pronounced not previously raised." Pet. App. 36; 2/7/2005 Tr. 30. Petitioner's counsel answered, "No, Your Honor." *Ibid.* The court then asked whether there was "[a]nything further from or on behalf of the defendant," and petitioner's counsel requested that the court recommend that petitioner be imprisoned near Knoxville, Tennessee. 2/7/2005 Tr. 30. After agreeing to make that recommendation, and again encouraging petitioner to use his time in prison wisely, the court once again asked petitioner whether there was "[a]nything further." *Id.* at 30-31. Petitioner's counsel answered "No." *Id.* at 31.

3. Petitioner appealed, arguing that the district court had inadequately explained the sentence; that the sentence violated the Sixth Amendment; and that the sentence was substantively unreasonable. Pet. C.A. Br. 20-47.

A divided panel of the court of appeals vacated the sentence and remanded for resentencing. Pet. App. 4-32. The majority held that petitioner's sentence was procedurally "unreasonable," *id.* at 14, 22, 25, because it found the district court's explanation for its sentencing decision inadequate and merely "perfunctory." *Id.* at 24; see *id.* at 23 ("[F]or a sentence to be reasonable a district court must clearly articulate the reasons for its ultimate sentencing decision."). While not addressing the standard of review, the majority in a footnote "urge[d] defense attorneys to press district courts to provide a thorough rationale for their sentencing determinations." *Id.* at 25 n.6. The majority added that, "[w]hile defense attorneys are certainly not required to do so, such action might spare us appeals such as this one." *Ibid.*

Judge Siler dissented in relevant part. Pet. App. 26-32. He disagreed with the majority's characterization of the explanation for the sentence as "offhanded," "mere lip service," and "perfunctory." *Id.* at 28. He also observed that "[i]f counsel had wanted the court to explain further why it felt that the defendant's family situation, prior criminal problems, or pretrial confinement were not factors to be influential in the determination of the sentence, counsel had the opportunity to obtain the ruling at that point in the sentencing." *Id.* at 29.

4. The court of appeals granted rehearing en banc. On rehearing, the en banc court affirmed petitioner's sentence by a vote of 9–6. Pet. App. 33-109.

a. The court first held that plain-error review applied to petitioner's claim that his sentence was procedurally unreasonable because the district court's explanation was inadequate. Pet. App. 37-41. The court held that "[a]t a sentencing hearing, as at every other phase of a criminal proceeding," a party who fails to make a timely objection "forfeits the argument and may obtain relief on appeal only if the error is 'plain' and 'affects substantial rights.'" *Id.* at 37-38 (quoting Fed. R. Crim. P. 52(b)).

The court relied chiefly on *United States* v. *Bostic*, 371 F.3d 865, 872-873 (6th Cir. 2004), in which it had held that failure to object under identical circumstances—*i.e.*, where a district court announces a proposed sentence and asks the parties whether they have any objections to the sentence that have not previously been raised—forfeits the objection and limits the party to plain-error review on appeal. Pet. App. 38-39. "*Bostic* reasoned that [this approach] would give the prosecution and defense alike an opportunity to articulate 'any objection and the grounds therefor'; it would 'aid the district court in correcting any error' and allow it to do so 'on the spot'; and it would facilitate the appellate process by highlighting 'precisely which objections have been preserved.'" *Id.* at 38 (quoting *Bostic*, 371 F.3d at 873). The majority held that *Bostic* remained good law after *Booker* and noted that petitioner had not contended otherwise. *Id.* at 39-40, 52.

Applying *Bostic*, the court held that petitioner was limited to plain-error review. Once the district court announced its proposed sentence, the court reasoned, any defect in its explanation would have been "apparent," yet petitioner's counsel answered "no" to the dis-

trict court's question whether he had any additional objections. Pet. App. 40.

The court of appeals then held that petitioner had not met his burden of showing plain error. Pet. App. 40-48. Although the district court's explanation was not "ideal," *id.* at 41, the court concluded that any error was not "plain," *id.* at 42-43. The court explained that the district court had shown that it understood petitioner's arguments and had identified and considered the factors in Section 3553(a) to which those arguments related. *Id.* at 42-44. The district court had then ruled on petitioner's arguments and unambiguously rejected them. Nothing in the statute, the Federal Rules, or applicable precedent, the court stated, required a lengthy explanation for rejecting each of a party's arguments for a sentence outside the Guidelines. See *id.* at 44-46. The court of appeals further noted that this Court has stated that the decision to impose a sentence within the Guidelines range "will not necessarily require lengthy explanation." *Id.* at 44 (quoting *Rita* v. *United States*, 127 S. Ct. 2456, 2468 (2007)).

b. The court next turned to petitioner's claim that his sentence was *substantively* unreasonable under *Booker*. This claim, the court held, was reviewed de novo, not for plain error, because "[a] litigant has no duty to object to the 'reasonableness' of the length of a sentence * * * during a sentencing hearing, just a duty to explain the grounds for leniency." Pet. App. 48. But the court ruled that the sentence was presumptively reasonable (because within the Guidelines range) and that petitioner had not rebutted that presumption. *Id.* at 50.

c. Judge Clay authored the principal dissent, which five other judges joined. Pet. App. 65-92. Judge Clay

contended that "[a] defendant has no duty to challenge the 'reasonableness,' either procedural or substantive, of the district court's sentencing decision at the time it is announced." *Id.* at 72. Therefore, Judge Clay concluded, a defendant's failure to lodge such an objection in district court does not require the court of appeals to apply the plain-error standard. *Id.* at 73. Judge Clay would have overruled the circuit cases applying *Bostic* to forfeited procedural-reasonableness claims. See *id.* at 76-77. Judge Clay also opined that, even under plain-error review, the sentence was procedurally unreasonable. *Id.* at 80-91.

Judge Martin, joined by Judges Cole and Clay, dissented separately. Pet. App. 56-65. Judge Martin contended that if plain-error review did not apply, petitioner would be entitled to reversal because the district court's explanation for the sentence was inadequate, as measured against the benchmark of the sentencing explanation that this Court affirmed in *Gall* v. *United States*, 128 S. Ct. 586 (2007). Pet. App. 58, 60.

Judge Moore, joined by Judges Martin, Daughtrey, Cole, and Clay, also dissented separately. Pet. App. 93-109. Although she acknowledged that "the majority is not alone in partially applying plain-error review," she suggested that the holding "deepen[ed] a growing circuit split." *Id.* at 100-101 (citing *United States* v. *Bras*, 483 F.3d 103, 112-113 (D.C. Cir. 2007)). In addition, Judge Moore opined that the court of appeals should abandon the presumption that a sentence within the advisory Guidelines range is reasonable. *Id.* at 93-94, 104-109.

ARGUMENT

Petitioner contends (Pet. 8-19) that the court of appeals' application of the plain-error standard conflicts

with the decisions of both this Court and other courts of appeals. Petitioner is incorrect. The court of appeals' decision implicates no conflict and is consistent with this Court's precedents. Further review therefore is not warranted.

1. As an initial matter, petitioner incorrectly suggests (Pet. i) that this case also presents the question whether a party must object in the district court to preserve a challenge to the *substantive* reasonableness of a sentence. The court of appeals correctly recognized that the adequacy of a sentencing court's explanation is a procedural issue that is distinct from the question of substantive reasonableness. As this Court explained in *Gall* v. *United States*, 128 S. Ct. 586 (2007), an appellate court reviewing a sentence "must first ensure that the district court committed no significant procedural error, such as * * * failing to adequately explain the chosen sentence * * * . Assuming that the district court's sentencing decision is *procedurally* sound, the appellate court should *then* consider the *substantive* reasonableness of the sentence imposed." *Id.* at 597 (emphases added); see also *Kimbrough* v. *United States*, 128 S. Ct. 558, 575-576 (2007) (first concluding that the district court "rested its sentence on the appropriate considerations and 'committed no procedural error,'" and then examining "[t]he ultimate question * * * 'whether the sentence was reasonable'") (quoting *Gall*, 128 S. Ct. at 600); *Rita* v. *United States*, 127 S. Ct. 2456, 2469-2470 (2007) (similar). Here, the court of appeals reviewed *only* the procedural issue for plain error; it treated petitioner's claim that his sentence was substantively unreasonable as properly preserved, and it reviewed the sentence for reasonableness in accordance with *Booker*. Pet. App. 48.

2. Because the plain-error question that petitioner presents involves only the procedural component of the district court's sentencing explanation, petitioner is incorrect in his assertion that the courts of appeals are split on the question. To the contrary, "*no* court of appeals * * * has rejected this last-chance approach to clarifying objections to a criminal sentence," and by reviewing for plain error the court of appeals in fact avoided creating a circuit split. Pet. App. 52 (emphasis added). See *In re Sealed Case*, 527 F.3d 188, 191-192 (D.C. Cir. 2008) ("Appellant did not object to the district judge's failure to explain his reasons either orally or in writing * * * . We therefore review the sentence for plain error."); *id.* at 198 n.3 (Kavanaugh, J., dissenting) (same); *United States* v. *Perkins*, 526 F.3d 1107, 1111 (8th Cir. 2008) ("Because Perkins did not object to the district court's articulation of its reasoning, we review that issue for plain error."); *United States* v. *Mangual-Garcia*, 505 F.3d 1, 15 (1st Cir. 2007) (applying plain-error review to "the contention by both appellants that the district court failed adequately to explain its reasons for imposing the particular sentence within the range"), cert. denied, 128 S. Ct. 2081 (2008); *United States* v. *Verkhoglyad*, 516 F.3d 122, 127-128 (2d Cir. 2008) (same); *United States* v. *Lopez-Velasquez*, 526 F.3d 804, 806 (5th Cir. 2008) (same); *United States* v. *Knows His Gun*, 438 F.3d 913, 918 (9th Cir.) (same), cert. denied, 547 U.S. 1214 (2006); *United States* v. *Lopez-Flores*, 444 F.3d 1218, 1220, 1221 (10th Cir. 2006) (applying plain-error review to a claim that "the district court did not explain its reasoning," because when a challenge goes to "the *method* by which the district court arrived at [a] sentence," then "the usual reasons for requiring a contemporaneous objection apply"), cert.

denied, 127 S. Ct. 3043 (2007); see also *United States* v. *Dragon*, 471 F.3d 501, 505 (3d Cir. 2006) (applying plain-error review to a claim that "the District Court failed to adequately consider the parsimony provision of 3553(a)").

The case on which petitioner (like dissenting Judge Moore, see Pet. App. 100-101) principally relies, *United States* v. *Bras*, 483 F.3d 103 (D.C. Cir. 2007), does not establish any circuit conflict on this issue. The court in *Bras* dealt with a substantive challenge to the reasonableness of the defendant's sentence. The court of appeals recognized that "[t]he plain error test does apply to objections that should have been raised at sentencing," but held that "[r]easonableness * * * is the standard of *appellate* review, not an objection that must be raised upon the pronouncement of a sentence." *Id.* at 113 (citation omitted). As the D.C. Circuit subsequently recognized in *In re Sealed Case*, *procedural* challenges must be properly preserved in the district court.

Petitioner's attempt (Pet. 12-13) to establish a conflict with the Seventh Circuit also fails. In *United States* v. *Cunningham*, 429 F.3d 673 (7th Cir. 2005), the defense attorney had not objected "to the judge's failure to explore Cunningham's alleged lack of cooperation * * * and to articulate his reasons for rejecting the argument

---

Judge Moore also noted (Pet. App. 102) that the courts of appeals have reached different conclusions concerning whether plain-error review applies to *substantive* reasonableness arguments not preserved in the district court. Compare *United States* v. *Peltier*, 505 F.3d 389, 391-392 (5th Cir. 2007) (applying plain-error review to all forfeited *Booker* errors), cert. denied, No. 07-8978 (June 23, 2008), with, *e.g.*, *Bras*, 483 F.3d at 113. Because the court of appeals expressly took petitioner's side on that question, see p. 8, *supra*, this case presents no occasion to review it.

for a lighter sentence on the basis of Cunningham's psychiatric problems and alcohol abuse." *Id.* at 679. The Seventh Circuit stated, without significant analysis, that "a lawyer in federal court is not required to except to rulings by the trial judge." *Id.* at 679-680 (citing Fed. R. Crim. P. 51(a)). But as the case that the Seventh Circuit cited makes clear, Rule 51(a) simply demonstrates that a party who has *already raised* an argument is not required to make a separate objection after the district court rejects it. See *United States* v. *Rashad*, 396 F.3d 398, 401 (D.C. Cir. 2005) (stating that "[a]ll a defendant need do to preserve a claim of error (and, hence, to obtain the more favorable 'harmless error' review) is inform the court and opposing counsel of the ruling he wants the court to make and the ground for so doing"). Here, by contrast, the district court allegedly committed a procedural error that petitioner *never* brought to the court's attention, even though the district court repeatedly asked the parties whether they had additional objections and the defendant repeatedly answered "no." The court of appeals expressly did not address the situation, apparently present in *Cunningham*, in which "the district court did not invite the parties to raise objections to the sentence." Pet. App. 53. And in any event, the Seventh Circuit's cursory analysis predated this Court's explanation of the distinct procedural and substantive components of post-*Booker* appellate review. See *Gall*, 128 S. Ct. at 597. *Cunningham* gives no reason to think that the Seventh Circuit has consciously split from the First, Second, Fifth, Sixth, Ninth, Tenth, and District of Columbia Circuits on this issue.

3. Petitioner is also incorrect in his assertion (Pet. 16-18) that the decision below conflicts with this Court's recent sentencing decisions. As the court of appeals

stated, "[n]othing about *Booker* suspends the obligation of counsel at a criminal proceeding to 'preserve a claim of error' for appeal." Pet. App. 54 (quoting Fed. R. Crim. P. 51(b)). To the contrary, the Court in *Booker* noted that it expected the courts of appeals to apply its holding subject to "ordinary prudential doctrines, * * * [such as] whether the issue was raised below and whether it fails the 'plain-error' test." *United States* v. *Booker*, 543 U.S. 220, 268 (2005). Nor is there any suggestion in *Gall*, *Kimbrough*, or *Rita* that parties are no longer obligated to raise all arguments concerning the appropriate procedures at sentencing; indeed, in all three of those cases the Court found *no* procedural error. *Gall*, 128 S. Ct. at 600; *Kimbrough*, 128 S. Ct. at 575-576; *Rita*, 127 S. Ct. at 2469. In fact, those recent decisions directly refute Judge Clay's assertion in dissent (Pet. App. 73) that procedural and substantive sentencing errors are subject to the same rules and that neither need be preserved in the district court. See p. 8, *supra*.

Furthermore, a procedural error at sentencing is subject to the general principle that any error "not brought to the [district] court's attention" is forfeited on appeal, unless it meets the four-part standard for reversible plain error. Fed. R. Crim. P. 52(b); see *United States* v. *Olano*, 507 U.S. 725, 732 (1993). A procedural error like the one petitioner claims to identify in the district court's sentencing decision could easily be corrected if brought to the district court's attention; petitioner's position, by contrast, would permit parties to stay silent, withhold their objections until appeal, and seek not just a correction but a vacatur of the entire sentence. The Court has regularly applied the plain-error rule under comparable circumstances, noting the bene-

fits of "concentrat[ing] * * * litigation in the trial courts, where genuine mistakes can be corrected easily." *United States* v. *Vonn*, 535 U.S. 55, 72 (2002) (applying plain-error review to an unpreserved claim that the district court failed to hold an adequate guilty-plea colloquy). Indeed, "the point of the plain-error rule * * * [is that] the defendant who just sits there when a mistake can be fixed cannot just sit there when he speaks up later on." *Id.* at 73. Thus, even if this Court had not already made clear that it will not "creat[e] out of whole cloth * * * an exception to [Rule 52(b)]," *Johnson* v. *United States*, 520 U.S. 461, 466 (1997), this case would not be an appropriate place to start.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General
MATTHEW W. FRIEDRICH
Acting Assistant Attorney General
VIJAY SHANKER
Attorney

JULY 2008